THE GEORGE HYMAN CONSTRUCTION COMPANY

CONTRACT NO. V101C-1695 **VABCA-3889**

VA MEDICAL CENTER BALTIMORE, MARYLAND

Kevin J. Connor, Esq., Olney, Maryland, for the Appellant.

Kenneth B. MacKenzie, Esq., Trial Attorney, Office of the General Counsel, Washington, D.C., for the Department of Veterans Affairs; ***Phillipa L. Anderson, Esq.,*** Deputy Assistant General Counsel; and ***William E. Thomas, Jr., Esq.***, Assistant General Counsel, additional attorneys of record.

OPINION BY ADMINISTRATIVE JUDGE ANDERS (PURSUANT TO BOARD RULE 12.3) SUMMARY FINDINGS OF FACT FOR THE PURPOSE OF RULING ON THE CROSS MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a dispute concerning placement of topsoil in interior planter boxes. The parties have each filed a motion for summary judgment. Appellant filed a response to the Government's motion, but the Government declined to file a response to the Appellant's cross-motion.

It is stipulated that there are no material facts in dispute. The following Findings of Fact are made for the purposes of this decision only.

In April, 1989, the Department of Veterans Affairs (VA or Government) awarded a contract in the amount of $98,941,000 to The George Hyman Construction Company (Appellant or Hyman) for construction of a 324-bed medical center in Baltimore, Maryland.

After award of the contract a dispute arose over whether the topsoil in planters located in the West Atrium should be flat or sloped. The planters in question are essentially concrete boxes, running along the outer Atrium wall between the second and third floors. They are constructed with the back wall of the planter box up against the Atrium wall and the front planter wall at a lower elevation. The side walls of the planter boxes are at the same elevation as the front walls. The Government interpreted its drawings as requiring the planter topsoil to be sloped or graded from the Atrium wall down to the front wall of the planters. In preparing its bid, Hyman interpreted the contract as requiring the topsoil to be flat and even with the front planter wall. The VA's direction to provide sloped topsoil in the West Atrium planters resulted in a claim by Appellant in the amount of $31,793 for alleged extra-contractual work. This appeal is from a final decision of the Contracting Officer (CO) denying that claim.

The contract specifications do not mention whether the topsoil in the planters in question is to be flat or sloped.

Contract Drawing No. 1-L14, 3rd Floor Plan Area B, Interior Planting Plan, entitled "Typical Planter Detail-Not to Scale" clearly shows the topsoil to be flat and even with the top of the planter's shorter planter wall.

Contract Drawings Nos. 1-185, West Atrium Section/Elevations, and 1-186, West Atrium Section/Elevations: At the lower right of each of these drawings, between the 2d and 3d floors, sloped topsoil is shown. On 1-185, the west planter side wall is depicted; and on 1-186 the east planter side wall. The far eastern and western side walls of the planter are depicted here. These drawings contain no other notes or construction instructions concerning soil slope.

Contract Drawing No. 1-187A, Note 6C, East Planters: Note 6C: This note contains the words "Planter Soil" with horizontal lines on either side of those words. The soil is shown level with sloped lines drawn above it. Appellant points out that Detail 3E on Drawing 1-186 shows the same sloped line marked "cement board," and that it interpreted Note 6C on Drawing 1-187A to reflect flat dirt and that same cement board.

Contract Drawing No. 1-190, Details 1E and 3E: The topsoil shown in both details appears flat. A very close examination reveals that the soil is shown approximately one-third feet below the top of the section in Detail 1E, and about one and one-half feet below the third floor in Detail 3E.

Contract Drawing No. 1-189, Detail 5A shows a flat topsoil.

The Government's directive to Appellant to create a slope, or grade, of the topsoil in the West Atrium planters resulted in extra costs to Appellant for additional soil and labor, for which it claims entitlement to $31,793.00. Inasmuch as the Government has not contested the amount of Appellant's claim, which appears reasonable, we find that Appellant's extra costs were as claimed.

POSITIONS OF THE PARTIES

The parties agree that the contract is ambiguous with regard to whether topsoil in the West Atrium planters was required to be flat or sloped because of different depictions of the planters on several contract drawings.

The parties also agree that, where a defect in the contract documents is so obvious, glaring or patent that the contractor should have noticed it before bidding, and the contractor made no attempt to seek clarification about it before bidding, the contractor proceeds in accordance with its unilateral interpretation at its own peril. ***Beacon Construction Co. v. United States***, 161 Ct.Cl. 1, 314 F.2d 501 (Ct. Cl. 1963).

The Government contends that the ambiguity was patent; that Hyman thus had a duty to inquire about it prior to bidding, and, having failed to do so, cannot prevail in its appeal. The Government further argues that Appellant's interpretation was not reasonable, since exclusive reliance by Appellant on the typical planter detail shown on Contract Drawing No. 1-L14 would have the effect of reading Contract Drawings Nos. 1-185, 1-186, 1-187A (Detail 6C), and 1-190 (Detail 3E) out of the contract.

Hyman contends that this ambiguity was not so obvious, blatant or glaring as to be

patent; that its interpretation of the drawings is reasonable and does not render any portion of such drawings meaningless; and that it is entitled to judgment as a matter of law under the doctrine of *contra proferentum*.

Hyman argues that the typical planter detail shown on Contract Drawing No. 1-L14 is the only drawing that is labeled "typical," and is also the only drawing that identifies the types of plants to be used and the means by which they are to be planted, including the configuration of the soil; that it is the drawing that on its face purports to be a typical view of the completed planter, and is the only drawing that is specifically intended to show what the installed soil and plants are to look like, clearly showing the soil to be flat.

Hyman further argues that the lack of any notes or construction instructions concerning soil slope on Contract Drawings Nos. 1-185 and 1-186 raises a presumption that these drawings refer only to the configuration of the soil at the ends of the planter.

DISCUSSION

The rule expressed in ***Beacon*** that a contractor proceeds with a unilateral interpretation of patently ambiguous contract documents at its own peril, is strictly limited to situations in which that ambiguity is obvious, blatant or glaring. Not every possible ambiguity imposes a duty on the contractor to make a pre-bid inquiry. ***W.G. Cornell v. United States***, 179 Ct.Cl. 651, 688, 376 F.2d 299, 310 (1967). A potential contractor is not required to seek clarification of all possible differences in interpretation. ***Pathman Construction Company***, ASBCA No. 22343, 81-1 BCA ¶ 15,010, at 74,263. Nor is a contractor expected to exercise clairvoyance in spotting hidden ambiguities in the bid documents. ***Blount Brothers Construction Co. v. United States***, 346 F.2d 962, 972-73 (Ct. Cl. 1965). As the court pointed out in ***L. Rosenman Corp. v. United States***, 390 F.2d 711, 713 (Ct. Cl. 1968), there can be no general definition of the difference between a patent ambiguity obligating a contractor to make inquiry, and a latent ambiguity for which no duty of inquiry arises, but each situation must be looked at on the basis of what a reasonable person would find to be patent and glaring.

We do not find the ambiguity to be patent. The "TYPICAL PLANTER DETAIL" on Drawing 1-L14 shows the topsoil to be flat. Drawings 1-190 and 1-189 depict flat topsoil. The sloped lines on Drawing 1-187A could, as Appellant observed, reasonably have represented the "cement board," also shown on Drawing 1-187A. The only clear indication of sloped topsoil appears on Drawings 1-185 and 1-186, and there it appears only at the far eastern and western ends of the planters. While Appellant has conceded that these drawings could be reasonably interpreted as providing for the soil to be sloped at the extreme ends of the planters, we do not find that the minimal representation of sloped soil at the planter ends makes it obvious that sloped soil was required for the entire length of the planter box. Thus, the ambiguity, in our opinion, is not glaring or blatant.

The Government has not taken issue with Appellant's assertion that the interpretation relied upon in this appeal was the interpretation it relied upon in preparing its bid.

Where, as here, the ambiguity is latent, although the contractor has no duty to inquire prior to bidding, its interpretation must also have been reasonable. If its interpretation was reasonable, and it relied upon that interpretation in preparing its bid, the meaning

will be given the document which is more favorable to the party who did not draw it. This rule, commonly referred to as *contra proferentem*, was expressed by the court in ***Peter Kiewit Sons' Co. v. United States***, 109 Ct.Cl. 390 , 418 (1947) where the court stated:

> Where the Government draws specifications which are fairly susceptible of a certain construction and the contractor actually and reasonable so construes them, justice and equity require that that construction be adopted. Where one of the parties to a contract draws the document and uses therein language which is susceptible of more than one meaning, and the intention of the parties does not otherwise appear, that meaning will be given the document which is more favorable to the party who did not draw it. This rule is especially applicable to Government contracts where the contractor has nothing to say as to its provisions.

It is not essential that a contractor demonstrate its position to be the only justifiable or reasonable one. ***George Bennett v. United States***, 371 F.2d 859, 861 (Ct. Cl. 1967). It is sufficient that the contractor's interpretation be within the "zone of reasonableness." ***W.P.C. Enterprises, Inc. v. United States,*** 323 F.2d 874 (1963). We find that Hyman has met that test.

DECISION

The Government's Motion for Summary Judgment is ***denied***.

Appellant's Cross-Motion for Summary Judgment is ***granted.***

Accordingly, the appeal of The George Hyman Construction Company, under Contract No. V101C-1695, VABCA No. 3899, is sustained, and Appellant is found entitled to an adjustment of $31,793, plus interest on its claim, as prescribed by the *Contract Disputes Act of 1978*, 41 U.S.C. §§601-613.

DATE: **February 7, 1994**

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DAN R. ANDERS
Administrative Judge
Panel Chariman

I concur:

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RICHARD W. KREMPASKY
Administrative Judge